the fact that the statute authorized that, during a new pharmacy's CNC application process, the existing pharmacies within a one-mile radius of the projected area may file an opposition. *Walgreen Co.*, 405 F.3d at 57. Thereupon, the Court of Appeals engaged in an analysis of several statistics regarding the certificates' issuance purporting to show discrimination intent against interstate commerce – which were the same statistics that the District Court determined were "insufficient to establish a pattern of discrimination." *Walgreen v. Rullán*, 292 F. Supp. 2d 298, 315 (D.P.R. 2003).

APPLICABLE LAW: DORMANT COMMERCE CLAUSE

The Constitution provides that Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The constitutional provision affirmatively granting Congress the authority to legislate in the area of interstate commerce "has long been understood, as well, to provide protection from state legislation inimical to the national commerce [even] where Congress has not acted." *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 310 (1994), quoting *Southern*

Walgreens stores were also "grandfathered" – as coined by Plaintiffs – and automatically entitled to a CNC. When the CNC Act was amended to include pharmacies, the statute made no distinction between local and national pharmacies. On the contrary, the only distinction the statute makes among pharmacies are those established prior to and after October 24, 1979. In sum, Walgreens has not presented sufficient evidence to substantiate its conclusory allegation of discriminatory purpose. *Walgreen*, 292 F. Supp. 2d at 315. Cert. Pet. App. 44.

Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 769 (1945). This negative command, known as the dormant Commerce Clause, prohibits states from acting in a manner that burdens the flow of interstate commerce. *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179-80 (1995); *Healy v. Beer Inst.*, 491 U.S. 324, 326 n. 1 (1989).

The restriction imposed on states by the dormant Commerce Clause is not absolute, and "the States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected." *Maine v. Taylor*, 477 U.S. 131, 138 (1986). To determine whether a statute violates the dormant Commerce Clause, several levels of scrutiny apply, depending on the effect and reach of the legislation.

First, a state statute is a *per se* violation of the Commerce Clause when it has an "extraterritorial reach." *Healy*, 491 U.S. at 336. "[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Id.* When a state statute regulates commerce wholly outside the state's borders or when the statute has a practical effect of controlling conduct outside of the state, the statute will be invalid under the dormant Commerce Clause. *Id.* A statute will have an extraterritorial reach if it "necessarily requires out-of-state commerce to be conducted according to in-state terms." *Id.*

Second, if a state statute discriminates against interstate commerce strict scrutiny should be applied. This means that the statute will be invalid unless the state can "show that it advances a legitimate local purpose that

cannot be adequately served by reasonable nondiscriminatory alternatives." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 100-01 (1994) This level of scrutiny will be applied if the state statute discriminates against interstate commerce on its face or in practical effect. *Taylor*, 477 U.S. at 138; *see also Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (indicating that a finding of discriminatory purpose or discriminatory effect can constitute economic protectionism subjecting the state statute to a "stricter level of invalidity").

Third, a lower standard of scrutiny is applied when the state statute regulates evenhandedly and has only incidental effects on interstate commerce. In this situation, a balancing test is applied. *Pike*, 397 U.S. at 142. "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* Moreover, the fact that a law may have 'devastating economic consequences' on a particular interstate firm is not sufficient to rise to a Commerce Clause burden. *See also Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127-28 (1978) (stating that "the [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.").

The proponent of a dormant Commerce Clause claim bears the burden of proof as to discrimination. *Immigration v. Enrico*, 533 U.S. 289, 300 n. 12 (2001); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977). This Court has established the elementary rule "that every reasonable construction must be resorted to in order to

save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895). To block summary judgment, the party having the burden of proof on a critical issue must present evidence on that issue that is "significantly probative," not "merely colorable." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). In view of the Court of Appeals' statistical consideration at the case at bar, it must be noted also that "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends an all of the surrounding circumstances." *International Bd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977).

ANALYSIS

Asociación agrees with, and incorporates by reference, Petitioner's argument that the Court of Appeals failed to appropriately adjudicate within the dormant Commerce Clause doctrine the fact the Puerto Rico's CON program was established by invitation of the federal statute, the 1974 Act. Thus, the instant brief focuses on the Court of Appeals' misapplication of the level of scrutiny, which the case at bar deserved.

First, the Court of Appeals' strained look pointed to the fact that in 1979 "the Act, as amended, excused an almost entirely local class of pharmacies from the certificate requirement." *Walgreen Co.*, 405 F.3d at 55, Cert. Pet. App. 10. But this in itself fails to show a discriminatory intent on Puerto Rico's behalf. As stated in the petitioner's brief, this Court has consistently validated the inclusion of grandfather clauses within the regulatory schemes for the

issuance of certificates of necessity and convenience. *See Crescent Express Lines v. United States*, 49 F. Supp. 92, 94 (D.C.N.Y. 1943) (grandfather clause "was apparently inserted to avoid the hardship which would result from forcing a carrier to justify his existing business in terms of public convenience"), *aff'd*, 320 U.S. 401 (1943); *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475, 481 (1949) ("the purpose of the grandfather clause was to assure those to whom Congress had extended its benefits a substantial parity between future operations and prior bona fide operations"). This grandfather clause, standing alone, shows no other intent but for Puerto Rico's Legislature to establish a reasonable balance between the new regulating procedures and the already operating pharmacies, twelve of which pertained to respondents. In fact, at the time of the CNC amendment, Walgreens had twelve (12) pharmacies operating in Puerto Rico. As stated by the District Court, the fact that an overwhelming majority of the pharmacies in the island prior to 1979 were locally-owned, and this group was relieved from having to undergo the CNC application process, does not lead the Court to adduce a discriminatory or exclusionary intent. *Walgreen*, 292 F. Supp. 2d at 315. Cert. Pet. App. 44.

Second, the Court of Appeals found suspicious the fact that the statute authorized the existing pharmacies within a one-mile-radius to oppose a projected certificate petition. Again, the Court's taxing look is misplaced. According to the Court, "the Secretary invokes this authority [to deny a CNC] only upon the urging of a member of the largely local group of existing pharmacies, thereby permitting a predominantly local group to manipulate the regulatory scheme for its own advantage." *Walgreen*, 405 F.3d at 57. But this premise falls short of showing a discriminatory

animus. The fact that an opposing pharmacy is allowed to ventilate its disagreement at a petition process does not belie the Secretary's own prerogative to consider, grant or deny the petition. The record in this regard lacks any evidence to allow even the reference of such alleged manipulation.

Moreover, as stated by the petitioner, the one-mile requirement is a narrowly drawn measure, since it only allows that pharmacy which is established within the applicants' circumference. Thus, the one-mile requirement proscribes the "largely local group," to which the Court refers, from participating in the petition process.[3]

Third, the Court of Appeals determined that the statistical evidence strongly indicated discrimination, while the District Court concluded it was insufficient. In words of the District Court: "According to data provided by the Department of Health, the Secretary has granted ninety percent (90%) of local pharmacy petitions when opposed, and fifty-eight percent (58%) of mainland petitions when opposed." *Walgreen*, 292 F. Supp. 2d at 315. Both mainland and local pharmacies are granted petitions

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[3] In this regard, the District Court held that: "Walgreens has not been denied access to the Puerto Rico market, except insofar as it seeks to establish new pharmacies in a one-mile radius where there are other existing pharmacies. More importantly, the statute applies equally to all potential pharmacies, regardless of their point of origin. Local pharmacy chains must face the same onerous procedure to obtain a CNC. The Act imposes the same burden on local pharmacy chains that seek to operate on the island. Therefore, the statute does not impose burdens on interstate commerce that exceed the burdens imposed on intrastate commerce." *Walgreen*, 292 F. Supp. 2d at 317. Cert. Pet. App. 49.

if they are unopposed. But most importantly, of the 58 CNC petitions submitted by Walgreen from 1979 to 2001, 43 were initially granted, and the 15 that were originally rejected were eventually granted as well.

The District Court correctly concluded that "Plaintiffs provide no information regarding the reasons for the denials of the out-of-state petitions vis a vis the local petitions. For example, certain petitions may have been denied because they were defective, or they sought the establishment of a pharmacy in a service area considered highly saturated pursuant to CNC guidelines. The Court is also unaware of the reasons why the CNC petitions granted to national pharmacies undergo a longer application process than those of local pharmacies. A myriad of factors might affect the application time-line. Such factors may include the service area where the pharmacy seeks to operate, the number of pharmacies already in the area, and the ratio of the area's population per pharmacy." *Walgreen*, 292 F. Supp. 2d at 315. Thus, as stated by this Court, statistics are refutable and subject to "all of the surrounding circumstances," which in this case were insufficient. *International Bd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977).

Recently, the Court of Appeals in *Alliance of Automobile v. Gwadosky*, November 18, 2005, ___ F.3d ___, 2005 WL 3157574 (1st Cir. 2005), addressed again the dormant Commerce Clause doctrine. In this case, automobile manufacturers' association challenged the constitutionality of Maine statutory amendment prohibiting automobile manufacturers, already statutorily required to reimburse dealers at retail-repair rates for warranty repairs, from "otherwise recover[ing]" their costs of reimbursement, e.g., through state-specific wholesale vehicle surcharges. The

Court while upholding Maine's statute expressed the following: "Where, as here, a party presents circumstantial evidence of an allegedly discriminatory purpose in support of a dormant Commerce Clause argument, it is that party's responsibility to show the relationship between the proffered evidence and the challenged statute. . . . [quotations omitted] The record makes pellucid, however, that if a potential discriminatory purpose was lurking in the background, that purpose was, at most, incidental to the primary purposes that we have identified. Incidental purpose, like incidental effect, cannot suffice to trigger strict scrutiny under the dormant Commerce Clause." *Id.* at 7 (quoting *Pike*, 397 U.S. at 142).

As discussed previously, the findings before the Court do not show that the CNC Act bore disproportionately on out-of-state interests, and much less possessed so invidious an impact. A lower standard of scrutiny should have been applied, since the CNC statute regulates evenhandedly and has only incidental effects on interstate commerce. Respondents, as proponents of a Commerce Clause claim, failed to show the relationship between the proffered evidence and the challenged statute. Thus, a balancing test under *Pike* should have been applied.

"Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. Puerto Rico's health regulatory system, encouraged by the 1974 Act, established as one of its objectives the "present and projected need of the population," which included benefiting "unattended populations" (*i.e.*, low-income, disabled or elderly populations). Before the Court

of Appeals, there was no sufficient evidence showing that Puerto Rico's CNC measure failed to suit this rationale. When the State is not a party to a contract, courts ordinarily defer, within broad limits, to the legislature's judgment about the reasonableness and necessity of a particular measure. *See Energy Reserves Group, Inc. v. Kan Power & Light Co.*, 459 U.S. 400, 412-13 (1983). Such deference was warranted in the instant case.

CONCLUSION

Respondents failed to carry their burden of proof. The record is devoid of facts sufficient to allow the Court of Appeals to strike the CNC under the dormant Commerce Clause, under any of the scrutiny standards. The precedent set by the Court of Appeals places undue jeopardy on similar statutes intended to secure the health and proper health services to the community they intend to protect.

For the foregoing reasons, the petition for certiorari should be granted, and the judgment below reversed.

Respectfully submitted,

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No. 05-585

IN THE

Supreme Court of the United States

ROSA PEREZ-PERDOMO, in her official Capacity as Secretary of Health of the Commonwealth of Puerto Rico,
Petitioner,

v.

WALGREEN CO.; WALGREEN OF SAN PATRICIO; and WALGREEN OF PUERTO RICO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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MOTION OF THE AMERICAN HEALTH PLANNING ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The American Health Planning Association (AHPA) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the *Petition for a Writ of Certiorari* submitted by Rosa Perez-Perdomo, in her official Capacity as Secretary of Health of the Commonwealth of Puerto Rico.

Respondents Walgreen Co.; Walgreen of San Patricio; and Walgreen of Puerto Rico refused to grant consent, offering no explanation, and necessitating this motion.

The interest of AHPA in this case stems from our knowledge and expertise in health planning, including state certificate of need programs, and our support for the important public policy objectives of state certificate of need programs to assure equitable access to health care at a reasonable cost for all persons. AHPA is the only national organization representing regional and state agencies engaged in the administration of state certificate of need programs.

AHPA and its members strongly support the use of certificate of need programs as an important health planning tool. Certificate of need programs are intended to promote a reasonable geographic distribution of health care services and facilities in order to avoid costs associated with excess health resource capacity while encouraging the development of needed health resources and services in medically underserved areas. Health planning in conjunction with certificate of need programs have the capability of improving both geographic and economic access to care.

For the above reasons, this motion for leave to file the attached brief *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF OF THE AMERICAN HEALTH PLANNING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE *AMICUS CURIAE*

The American Health Planning Association (AHPA) is a national voluntary membership organization and non-profit public interest organization dedicated to the development of policies and community health systems that assure equitable access to health care at a reasonable cost for all persons.[1]

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* states that no counsel for any party to this dispute authored the motion or brief in whole or part and no person or entity other than *Amicus Curiae* made a monetary contribution to the preparation or submission of the motion or brief.

AHPA is the only national organization representing regional and state agencies engaged in the administration of state certificate of need programs. AHPA members represent about one third of the states with certificate of need programs nationwide. AHPA's membership consists largely of representatives of state and regional planning and certificate of need agencies. AHPA is a nonprofit organization and is tax exempt under Section 501(c)(3) of the Code of the Internal Revenue Service.

AHPA's interest in this case stems from its concern that the ruling of the First Circuit Court could call into question states' authority to implement and enforce certificate of need laws that serve a valuable public policy purpose in controlling health care costs and ensuring appropriate access to quality services.

Community-based health resource planning and certificate of need regulation are flexible tools that can help states protect the critical health care infrastructure that is required to meet both expected and unanticipated public health care need. Certificate of need programs in conjunction with state and regional health plans can be and have been used to avoid unnecessary health care costs that are incurred when communities have excess health resource and service capacity. *See* Randall Bovbjerg, *Problems and Prospects for Health Planning: The Importance of Incentives, Standards, and Procedures in Certificate of Need*, 83 Utah L. Rev. 83, 85 (1978).

Health planning and certificate of need regulation are critically important tools available to states to promote and ensure that there is a reasonable geographic distribution of health care services and resources, including health services and resources needed in medically underserved areas. Certificate of need programs, in conjunction with state and community health plans, can be used, and often are used, proactively to improve both geographic and economic access to care.

In states without planning and certificate of need programs, communities and local jurisdictions are increasingly turning to local authorities and courts to try to compensate for the lack of planning and constructive regulation (application of state police power) at the state level. *See* Josh Duke, *Court Ruling Allows St. Francis to Resume its Plans to Build in Mooresville*, Indianapolis Star, November 4, 2005.

AHPA's concern is that the First Circuit Court's ruling may be used to undermine state certificate of need programs.

SUMMARY OF ARGUMENT

We urge the Court to grant certiorari in this case to avoid allowing the First Circuit Court's ruling to be used to undermine state certificate of need programs. Health planning and certificate of need regulation are critically important tools available to states to promote and ensure that there is a reasonable geographic distribution of health care services and resources, including health services and resources needed in medically underserved areas. Certificate of need laws also provide an important means by which states regulate the quality of health care services provided to their residents.

By their nature, certificate of need laws regulate the addition of health facilities, services and equipment to the market. Evaluating the market as it existed prior to enactment of the certificate of need program reflects the result of the unregulated market and does not provide insight into the impact of the law. Thus, the First Circuit should have limited its analysis of the Puerto Rico certificate of need law to the law's effect on the market after it was enacted.

If a law has the effect of discriminating against interstate commerce, the state must justify the law in terms of the local benefit flowing from the law and the unavailability of nondiscriminatory alternatives adequate to preserve the local interest at stake. *See Walgreen Co. v. Rullan*, 405 F.3d 50, 59

(1st Cir. 2005). AHPA believes, as discussed in this brief, that there are compelling policy reasons to support certificate of need programs, even if there were a disproportionate impact on interstate commerce.

ARGUMENT

I. THE VALUE OF CERTIFICATE OF NEED PROGRAMS

Certificate of need laws did not grow solely out of the Federal mandate set forth in the National Health Planning and Resources Development Act of 1974. *See* Pub. L. No. 93-641 88 Stat. 2225 (repealed 1986). Their development grew out of a clear, recognized need. Between 1966 and 1975, at least 29 states voluntarily implemented certificate of need laws before they were mandated nationally by the National Health Planning and Resources Development Act in 1976.[2] *See* American Health Planning Association, *National Directory of Health Planning, Policy and Regulatory Agencies*, January 2005.

Long before enactment of the National Health Planning and Resources Development Act, state enactment of certificate of need programs was recognized as a valid exercise of a state's police powers. *See Attoma v. State Department of Social Welfare*, 270 N.Y.S. 2d 167 (1966). Noting that the proliferation of nursing homes beyond the needs of a geographical area with spiraling cost to the users of such homes bears a reasonable relation to the welfare of the community, a court upheld one of the country's first certificate of need laws against constitutional challenge in 1966. *Id.* at 172.

In addition, a parallel program under Section 1122 of the Social Security Act (42 USC 1320a-1), which was enacted in

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[2] As of 1975, the following states had certificate of need statutes: NY, RI, MD, CA, NJ, SC, WA,OK, NV, MN, ND, OR, AZ, MA, KY, MI, SD, KS, CT, FL, TN, VA, IL, HI, OH, AR, MT, TX and CO.

1972 and therefore preceded enactment of the National Health Planning and Resources Development Act, was intended to assure that Medicare and Medicaid funds were not used to support unnecessary capital expenditures and that reimbursement under Medicare and Medicaid would support health planning activities in the states. Section 1122 granted states the authority to deny Medicare, Medicaid, and Title V (Maternal and Child Health Program) reimbursement to facilities whose capital expenditures were not approved by a state health planning agency.

While a handful of states repealed their certificate of need laws after Congress repealed the National Health Planning and Resources Development Act in 1986, most states retained the laws in recognition of the value of health planning. Moreover, in response to the rapid escalation of cost and loss of access of care, in the early 1990s some states that had abandoned health planning in whole or part passed new certificate of need laws. *See* Robert Pear, *States are Moving to Re-Regulation on Health Costs: Planning is Back in Favor*, New York Times, at 1 (May 11, 1992).

Recent changes in the hospital market may make certificate of need laws even more valuable. A recent article in *Health Affairs* states that market driven health care environments are endangering the financial viability of community hospitals by allowing for the proliferation of physician owned specialty hospitals. *See* Sujit Choudhry, Niteesh K. Choudhry, and Troyen A. Brennan, *Specialty Versus Community Hospitals: What Role For The Law?*, Health Affairs Web Exclusive, 9 Aug 2005, http://content.healthaffairs.org/cgi/reprint/hlthaff.w5.361v1.pdf.

The authors concluded that state certificate of need laws are the best solution to ease the burden to community hospitals and ensure access to care without stifling innovation and efficiency. *Id.* at W5-367.

Certificate of need laws also provide an important means by which states regulate the quality of health care services provided to their residents. The most recent and largest study of certificate of need regulation on treatment outcomes found that open heart surgery mortality rates are more than 20 percent lower in states with certificate of need regulation than in states without regional planning and regulation. *See* Mary S. Vaughan-Sarrazin, PhD; Edward L. Hannan, PhD; Carol J. Gormley, MA; Gary E. Rosenthal, MD, *Mortality in Medicare Beneficiaries Following Coronary Artery Bypass Graft Surgery in States With and Without Certificate of Need Regulation*, J. Am Med. Ass'n, Vol. 288 No. 15, October 16, 2002, 1859-1866.

In addition, empirical studies by all three major U.S. automakers show substantially lower health care costs in states with certificate of need programs. *See* General Motors Corporation, *Statement of General Motors Corporation on the Certificate of Need (CON) Program in Michigan*, February 12, 2002; Ford Motor Company, *Relative Cost Data vs Certificate of Need (CON) for States in Which Ford has a Major Presence*, February 2002; DaimlerChrysler Corporation, *Certificate of Need: Endorsement by DaimlerChrysler Corporation*, February 2002.

II. THE FIRST CIRCUIT ERRED IN TAKING INTO CONSIDERATION THE COMPOSITION OF THE PHARMACY MARKET PRIOR TO ENACTMENT OF PR LAW 189

The dormant Commerce Clause is not absolute in its restriction on the states, and in the absence of conflicting legislation by Congress, "the States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected." *Pharmaceutical Care Management Association v. Rowe*, 2005 WL 2981063 (1st Cir.(Me.)) *quoting Maine v.*